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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

No. 919

JEANETTE E. GONDECK, Intervenor,
Petitioner,

vs.

PAN AMERICAN WORLD AIRWAYS, INCORPORATED
and THE TRAVELERS INSURANCE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Jeanette E. Gondeck prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on February 9, 1962.

OPINIONS OF THE COURTS BELOW.

By Findings of Fact and Compensation Order dated December 31, 1959, William M. O'Keeffe, Deputy Com-

missioner of the United States Department of Labor, Bureau of Employees' Compensation, Sixth Compensation District, in the matter of the claim for compensation under The Defense Bases Compensation Act, made an award of compensation to the Petitioner as Claimant and widow of Frank J. Gondeck, deceased, and his minor daughter Barbara Ann Gondeck. The Order is set forth at pages A14-A18, of the appendix of this petition; the decision is not reported.

On the review of the award to the United States District Court for the Southern District of Florida, Honorable Emett C. Choate, District Judge, by Findings of Fact and Conclusions of Law entered September 15, 1960 (App. A10), and Final Judgment entered November 7, 1960 (App. A14), set aside the award and enjoined enforcement thereof, by granting the motion for summary judgment filed by the employer-carrier, the Plaintiffs therein and Respondents herein. The decision is not reported.

In the appeal to the United States Court of Appeals for the Fifth Circuit, the Court affirmed the Final Judgment of the District Court and Dismissed the appeal of the United States, by judgment entered February 9, 1962 (App. A10). The opinion of the Court of Appeals has not yet been reported and is set forth in the appendix of this petition at pages A3-A9.

A petition for rehearing was denied by Order of March 7, 1962.

JURISDICTION

Judgment was entered by the Court of Appeals for the Fifth Circuit on February 9, 1962, and the timely petition for rehearing was denied March 7, 1962.

Jurisdiction to review the judgment by writ of certiorari is found in 28 U.S.C., Sections 1254 (1) and 2101 (c) as well as in Rule 19 (b) of the rules of this Court under this Court's power of supervision over the Federal Judicial system, and more particularly on the grounds that the Court of Appeals for the Fifth Circuit has rendered a decision in conflict with the decisions of this Court and of other Courts of Appeals, and has so far departed from the accepted and usual course of judicial proceeding and has sanctioned such a departure by the District Court, as to call for an exercise of this Court's power of supervision.

STATUTES INVOLVED

The statutory provisions involved are the Defense Bases Compensation Act, of August 16, 1941, 55 Stat. 622, 42 U.S.C. 1651 (a)(1); the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, as amended, July 26, 1956, 70 Stat. 654, 33 U.S.C. 903 (b), 920 (a), 920 (c), 920 (d), 921 (b); and the Administrative Procedure Act of June 11, 1956, 60 Stat. 237, 5 U.S.C. 1009, the pertinent portions of which are set forth in the Appendix herein.

QUESTIONS PRESENTED

1. Should the remedial humanitarian intent of a workmen's compensation act be subverted by outmoded common law principles of an equitable nature in a case where a widow and her child have been awarded compensation for the death of a worker at a defense base where the Deputy Commissioner found that the death occurred in the course of, and growing out of his employment while returning to base from reasonable recreation of type known

to and made readily available to the employees by the employer where it appears that the decedent was a passenger in a company vehicle forbidden for such use, but that decedent was never so informed?

2. Is a defense base worker within a zone of special danger and entitled to compensation for injuries and death suffered while returning to base after seeking reasonable recreation and entertainment of a type known to the employer and made more readily available to the employees, although such recreation and entertainment was not furnished or supervised by the employer?

3. Does the Administrative Procedure Act grant the Federal Courts the power to reweigh the evidence and inferences drawn therefrom in the review of an award of compensation for death based on stipulated facts in a Defense Bases Compensation case?

STATEMENT OF THE CASE

The case was submitted to the Deputy Commissioner on stipulated facts. They are adequately summarized by the Court of Appeals, and the Court's statement from its opinion is accepted as the statement of the case (R. 105-107), and in this appendix, pp. A4-A6.

However, briefly stated in the interest of continuity, Frank Gondeck was employed as a civilian worker at the United States Air Force Base, San Salvador Island, B.W.I.

He was on duty eight hours and off 24, subject to emergency call at all times. On April 24, 1958, he went to nearby Cockburn Town in a jeep driven by James F. Norman; Fox Fry and R. M. Smith were also passengers. They had one beer, and on the return, almost at the gate,

the jeep overturned. Gondeck was injured, and died on April 27, 1958.

Smith and Norman had been warned not to use the jeep for personal missions; Gondeck had not been so informed.

The Deputy Commissioner entered an award of compensation and funeral expenses to the widow and surviving child. On review the District Judge set aside the award and enjoined enforcement. The Court of Appeals for the Fifth Circuit affirmed.

REASONS FOR GRANTING THE WRIT

Reversal of the decisions of the Court of Appeals and the District Court and reinstatement of the award of compensation by the Deputy Commissioner is sought because the beneficial provisions of the compensation laws were disregarded and the intent of Congress misapprehended when it was held that Frank J. Gondeck's death was not a consequence of his employment.

The Court of Appeals for the Fifth Circuit is in conflict with the opinions of this Court and other Courts of Appeals in holding defense base workers may not be compensated for injuries or death suffered on return trips to their bases from reasonable recreation trips to town if the recreation is not furnished and supervised by the employer; in transportation not provided by the employer for the specific purpose, and that the employer must receive some tangible benefit as contrasted to improvement of worker morale, which the Court denotes an intangible immaterial benefit.

The Court of Appeals for the Fifth Circuit departed from the opinions of this Court and other Courts of Appeals

by setting aside an award of compensation for death suffered by a defense base worker while returning to base in a company vehicle.

The Court of Appeals for the Fifth Circuit has penalized the widow and minor child of a deceased defense base worker for the violation of a company rule by another worker without the decedent's fault, where the violation resulted in decedent's death.

The Court of Appeals for the Fifth Circuit has misapprehended the scope of judicial review permitted in the Administrative Procedure Act and has expanded the judicial authority.

POINT I

The Deputy Commissioner Properly Awarded Compensation for Death of a Defense Base Worker Who Was Killed While Returning to Base from a Trip to Town While Seeking Reasonable Recreation.

Reasonable recreation is an incident of civilian employment at a United States military base in a foreign land. *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951). This principle is so deeply ingrained into the Defense Bases Act that it cannot be reasonably controverted.

In other jurisdictions, the same principle has been consistently followed, and compensation awarded:

Hastorf-Nettles v. *Pillsbury*, 203 F.2d 641 (9th Cir. 1953) (returning to defense base from county fair).

C. V. Lytle Co. v. *Whipple*, 156 F.2d 154 (9th Cir. 1944).

Liberty Mutual Ins. Co. v. *Gray*, (McClees' case) 137 F.2d 926 (9th Cir. 1943) (returning to defense base after overstaying leave).

Turner v. *Willard*, 154 F. Supp. 352 (S.D.N.Y. 1956) (returning to defense base from bowling league conference).

Travelers Ins. Co. v. *O'Hearne*, (Wilson's case) No. 1436, E.D. Va. (1953) (unreported) (returning to defense base in jeep).

Travelers Ins. Co. v. *O'Hearne*, (O'Mara's case) No. 1429, E. D. Va. (1954) (unreported) (killed in Algiers chasing thief who grabbed his wallet at a movie line).

The State acts seem to follow this rule:

Lamm v. *Silver Falls Timber Co.*, 286 Pac. 527 (Ore. 1930) (returning to lumber camp from home).

Gabumas v. *Pan American World Airways*, 188 N. Y. S. 2d 372 (1951) (stewardess in bicycle mishap during layover in Paris).

Lewis v. *Knappen-Tibbetis-Abbott Eng. Co.*, 108 N.E.2d 609 (N.Y. 1952) (shot by sniper while sightseeing in Jerusalem).

In analogous situations, such as actions for seamen's maintenance and cure, injuries suffered during shore leave have been held by this Court to be within the scope of employment.

Warren v. *United States*, 340 U.S. 523 (1951).

Farrell v. *United States*, 336 U.S. 511 (1949).

The Fifth Circuit's proposition that benefit to the employer must be shown to provide coverage for recreational injuries is in direct conflict with this Court.

The Fifth Circuit said herein:

> "No benefit to the employer has been shown to result from the going by GONDECK to a native club for a beer unless it be the intangible and, we think, immaterial benefit of improvement of morale that might be the consequence of such excursion."

On the other hand, this Court said in *O'Leary* v. *Brown-Pacific-Maxon, Inc.*:

> "Nor is it necessary that the employee be engaged at the time of the injury in activity of benefit to his employer." 340 U.S., 507.

The Act creates the presumption of coverage. Title 33, U.S.C. 920(a).

The presumption is strengthened by the sparsity of defenses granted the employer by Congress. Title 33, U.S.C. 903(b). Possible administrative misinterpretation of workers' rights is minimized by the further presumption that the worker is not guilty of violating either of the prohibitions. Title 33, U.S.C. 920(c, d); *C. V. Lytle Co.* v. *Whipple*, 156 F.2d 154 (9th Cir. 1944).

These sections are indicative of the Congressional intent.

This Court has propounded and consistently followed the doctrine of liberal interpretation of remedial legislation to accomplish the beneficial intent of Congress. *Cox* v. *Roth*, 348 U.S. 207 (1955); *Pillsbury* v. *United Engineering Co.*, 342 U.S. 197 (1952). The Fifth Circuit has departed from this doctrine.

The Deputy Commissioner made a proper award, and it should be reinstated.

POINT II

The Deputy Commissioner Properly Rejected Outmoded Common-Law Conceptions of Scope of Employment and Held the Decedent Was Injured Within a Zone of Special Danger.

In *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 511, this Court said:

> "Workmen's compensation is not confined by common-law conceptions of scope of employment. * * * All that is required is that the obligations and conditions of employment create the 'zone of special danger' out of which the injury arose".

The Fifth Circuit has removed that protective mantle and has reinstated common-law conceptions of scope of employment—except that at the employer's pleasure, he can decide to furnish some recreation. The doctrine of "zone of special danger" has been discarded by the Fifth Circuit.

This narrowing of the protection of the Act by the Court of Appeals requires review by this Court.

POINT III

The Deputy Commissioner Properly Held That the Decedent Was Covered by the Act for Death Suffered While Returning to Base in a Company Jeep.

Workers are generally held covered by compensation while they are returning to a place of employment away from home.

Where a defense base worker lived one mile from base, but went to town 17 miles away and overstayed his leave, he was awarded compensation for injuries suffered in an accident in a truck he caught to return to base. *Liberty Mutual Ins. Co.* v. *Gray*, 137 F.2d 926 (9th Cir. 1943).

A worker hitched a ride back from a fair 50 miles away and was injured, and awarded compensation. *Hastorf-Nettles, Inc.*, v. *Pillsbury*, 223 F.2d 641 (9th Cir. 1953). See also, *C. V. Lytle Co.* v. *Whipple*, 156 F.2d 154 (9th Cir. 1944).

Frank Gondeck was returning to his base where he was subject to call 24 hours a day. The fact is that he was returning to the base from town. Had he gone in by

bus and hitched back, he would have been covered. The company rules permit employees to hitch back from town. Gondeck was certainly in at least a comparable position to hitch hiker.

POINT IV

The Deputy Commissioner Properly Refused to Penalize the Claimant for Violation of a Non-communicated Unenforced Company Rule.

Nothing in the Act permits an employer to make rules prescribing the limits of coverage, or makes the violation of a company rule grounds to deny coverage. Title 33, U.S.C. 903(b).

O'Leary v. *Brown-Pacific-Maxon Inc.*, 340 U.S. 504 (1951).

Bull Insular Line v. *Schwartz*, 23 F. Supp. 354 (E.D. N.Y. 1938).

Penn Stevedoring Corp. v. *Cardillo*, 72 F. Supp. 991 (S.D. N.Y. 1947).

However, the District Judge specified his reasons for reversal: Gondeck was injured while violating two company regulations regarding the jeep. (Appendix A12).

However else the opinion of the Court of Appeals attempts to avoid this obviously erroneous interpretation of the Act, the holding impliedly adopts it, and Mrs. Gondeck and her daughter are being penalized for the violations of Smith and Fox. Frank Gondeck did not violate the company rule. Justice cries against such a result.

POINT V

The Administrative Procedure Act Does Not Broaden the Scope of Judicial Review.

The Court of Appeals stated its interpretation of the Administrative Procedure Act as to the scope of judicial review of administrative agency orders as follows:

> "This is not an accurate statement, at least since the passage of the Administrative Procedure Act, of the principle governing a judicial review of an administrative determination. The findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole."

Presumably, the Court of Appeals would have reinstated the compensation award except that it conceived that under the Act it had authority to reweigh the evidence. This is submitted to be a misconception of the Congressional intent in the passage of the Act.

The Court of Appeals correctly quoted this Court's interpretation of the Act from *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, but misapplied the statement of law by the implication that the Act changed the existing body of law. This Court affirmed a three-judge Court of the Eastern District of Missouri, wherein that Court said:

> "Plaintiffs also refer to section 10 of the Administrative Procedure Act, 5 U.S.C.A., § 1009, but it is clear that that Act merely was a declaration of existing law when judicial review is provided." *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 130 F. Supp. 76, 78 (E.D. Mo. 1955), *aff'd*. 350 U.S. 892 (1955).

The Fifth Circuit is in direct conflict with this Court's affirmance of the three-judge Court of the Eastern District of Missouri by holding that the Administrative Procedure Act widened the scope of judicial review.

This Court's interpretations of the scope of judicial review, *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U.S. 469 (1947), were not adhered to.

POINT VI

The Factual Situation Herein Is Not Singular But Is Recurring.

For some reason or other, defense base workers are frequently involved in serious accidents during recreation and while returning to base.

We know that District Judge Simpson, who sat on the appellate argument below, is awaiting this Court's ruling for guidance on one other case now pending before him for review. The Deputy Commissioner has at least two more cases involving the same legal issues.

Government contractors recruit workers for defense base employment, and cite as inducement the glamorous and exotic life abroad, and the full protection of compensation.

Having induced the workers away from home, the protection of the Act is being withdrawn by the discovery of "judicial small print" when they seek to relieve the tediousness of base life by going to town.

In the ever expanding space age defense program, the Fifth Circuit states will be, as it is now, the principle area for determination of claims under the Defense Bases Act.

With conflicts between Circuits now existing in the interpretations of the Compensation Act, and with one of the judges from the Court below still uncertain of his own ruling, it is submitted that review by this Court of the judgment is required to resolve the issues.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for Certiorari were mailed to Leo Alpert, Biscayne Building, Miami 32, Florida, E. Boardman, U. S. District Attorney and the Attorney General, this ..... day of April, 1962.

STATUTES INVOLVED

5 U.S.C. 1009.

"* * * the reviewing court shall decide all relevant questions of law * * *. It shall * * * hold unlawful and set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence * * *; (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the record * * *"

42 U.S.C. 1651.

Compensation authorized—places of employment.

a) Except as herein modified, the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, shall apply in respect to the injury or death of any employee engaged in any employment,

(1) at any military, air or naval base acquired after January 1, 1940, by the United States from any foreign government.

33 U.S.C. 920.

Presumptions. In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary,

a) That the claim comes within the provisions of this chapter.

c) That the injury was not occasioned solely by the intoxication of the injured employee.

d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another.

33 U.S.C. 903.

Coverage.

b) No Compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

33 U.S.C. 921(b).

Review of compensation orders.

b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred.

OPINIONS AND JUDGMENTS OF THE COURTS BELOW

Opinion of the Court of Appeals

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT.

No 18897

UNITED STATES OF AMERICA and
JEANETTE E. GONDECK, Intervenor,
Appellants,

vs.

PAN AMERICAN WORLD AIRWAYS, INCORPORATED,
and THE TRAVELERS INSURANCE COMPANY,
Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA.

(February 9, 1962)

Before JONES and BELL, Circuit Judges, and SIMPSON, District Judge

JONES, Circuit Judge: The district court set aside an order of William M. O'Keeffe, Deputy Commissioner, Department of Labor, by which compensation was awarded to Jeanette E. Gondeck for the death of her husband, Frank J. Gondeck, pursuant to the provisions of the Defense Base Compensation Act, 42 U.S.C.A., § 1651 et seq. By this statute the employees under it were covered by the provisions of the Longshoremen's and Harbor Work-

ers' Compensation Act, 33 U.S.C.A., § 901 et seq. The evidentiary facts are stipulated. The inferences drawn from the stipulated facts by the Deputy Commissioner and his findings are challenged.

Frank J. Gondeck, a Florida resident, was employed by Pan American World Airways in March, 1958, as a diesel generator operator at a defense base on San Salvador Island, British West Indies. His work required him to put in an eight-hour shift on the job after which he was off twenty-four hours. He was subject to call for emergencies when off duty. He lived at a dormitory on the Base. There was a recreation center on the Base known as the Reef Club. At Cockburn Town, about three miles from the Base, was a night club known as the Blue Marlin Club. Pan American operated a bus on a regular schedule for transporting its employees, without charge, between the Base and the town. Pan American supplied a jeep for transporting the diesel operators to and from the several generating plants.

Gondeck went off duty at 4:00 o'clock on the afternoon of April 24, 1958. With seven or eight other employees he went to the Reef Club where they sat around drinking champagne, with time out for chow, until about 7:30 o'clock in the evening when Gondeck, in the company of James F. Norman, Fox F. Fry and R. M. Smith, took off in the jeep for town. They went to the Blue Marlin, a native club, where they stayed for about fifteen minutes, had a beer, and started back to the Base with Norman driving the jeep. The use of the jeep for personal missions of employees was forbidden by Pan American. Norman and Smith had been warned a few days earlier that the jeep was not to be used except for official business. It was not shown whether this was known by Gondeck. As the jeep approached the gate to the Base, it went out of control,

skidded, and turned over. Smith was killed. Gondeck sustained brain injuries from which he died three days later. In his order making an award of compensation the Deputy Commissioner found, among other things, that Gondeck had completed his day's work and was, on the journey to Cockburn Town, seeking reasonable recreation and entertainment, that he was on call for emergency duty. An award was made to the widow for herself and the child of the decedent by the Deputy Commissioner against Pan American and Travelers Insurance Company, its compensation insurance carrier.

Pan American and the Travelers Insurance Company brought suit against the Deputy Commissioner to set aside the award and to enjoin its enforcement. The United States Attorney represented the Deputy Commissioner in the litigation. Jeanette E. Gondeck intervened. On September 15, 1960 (and here the dates begin to become important), the district court made and filed findings of fact and conclusions of law in which it was stated that there was no substantial evidence that Gondeck was engaged in the scope of his employment at the time of his injury or that his injury and subsequent death arose out of or in the course of his employment. It was concluded that the award should be set aside. On September 21, 1960, the Deputy Commissioner filed a motion to amend the findings and conclusions or for a new trial. On September 26, 1960, Mrs. Gondeck filed a similar motion. The court's judgment setting aside the award and enjoining its enforcement was dated November 7, 1960, and filed on the following day, November 8, 1960. On November 16, 1960, orders were entered denying the two motions. On January 13, 1961, the United States, which was never a party to the suit, filed a notice of appeal, not from the judgment, but from the order "denying Motion to Amend Findings of Fact and Conclusions of Law and denying Motion for New

Trial." On January 13, 1961, the intervenor filed a notice of appeal from the final judgment of November 8, 1960, and the order of November 16, 1960. The appellees have moved to dismiss the appeal of the United States on the ground that it was not and is not a party and has no right to appeal, that the order on the motion for which it attempts to appeal is not a final order, and that the appeal was not taken within the time permitted by the rules. The appellees also move to dismiss the appeal by the intervenor on the ground that her appeal was not taken within the prescribed time.

We think there must be a dismissal of what purports to be an appeal of the United States. It was not a party to the proceedings in the district court and would not have been a proper party had it sought to become one. The identity of the United States and of the Deputy Commissioner are separate. No notice of appeal was filed by the Deputy Commissioner although the United States Attorney filed in his name a statement of "points on appeal" and a designation of the record on appeal. These do not make an appellant out of either the United States or the Deputy Commissioner. These matters do not preclude the intervenor, Jeanette E. Gondeck, from taking an appeal by the timely filing of a notice of appeal. Whether she has done so is one of the questions for our decision.

The appeal of the intervenor was, we conclude, taken within the prescribed time. The running of the time for taking an appeal is suspended until disposition is made of a timely motion to amend or make additional findings of fact. Rule 73 (a), Fed. Rules Civ. Proc., 28 U.S.C.A. Where, as in the case here, the motion presented a substantial question and the motion is not disposed of either expressly or by necessary implication, by the judgment, the rule is applicable although the motion was made be-

fore but not overruled until after the judgment. *Phinney* v. *Houston Oil Field Material Co.*, 5th Cir., 1958, 252 F. 2d 357; *Partridge* v. *Presley*, 88 U.S. App. D.C. 298, 189 F. 2d 645, cert. den. 342 U.S. 850, 72 S. Ct. 79, 96 L. Ed. 642. Cf. *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 65 S. Ct. 254, 89 L. Ed. 160. The order on the motion was entered November 16, 1960. The Intervenor's notice of appeal was filed on January 13, 1961. The Deputy Commissioner was an officer of the United States and therefore the time of taking an appeal was sixty days as to all parties, including the intervenor. 28 U.S.C.A., § 2107, Rule 73 (a) supra.

The intervenor-appellant asserts that "In the absence of a finding that Gondeck was injured and killed within the terms of Sec. 903 (b),[1] the award must be reinstated. This is not an accurate statement, at least since the passage of the Administrative Procedure Act,[2] of the principle governing a judicial review of an administrative determination. The findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole. *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 71 S. Ct. 470, 95 L. Ed. 483; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed. 456. The intervenor urges the proposition that Gondeck was entitled to seek recreation away from the base where he was employed as an incident of his employment and, having received the injuries resulting in his death in returning from a recreational excursion, it follows that death benefits under the Act are payable. The doctrines applicable cannot be stated by such a broad

1. "... compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another. 33 U.S.C.A., § 903(b).

2. 5 U.S.C.A. §§ 1001-1011.

theorem. Professor Larson, thus announces the general principles:

> "Recreational or social activities are within the course of employment when
>
> "(a) They occur on the premises during a lunch or recreation period as a regular incident of the employment; or
>
> "(b) The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or
>
> "(c) The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life." 1 Larson's Workmen's Compensation Law 328, § 22.00.

The stated tests are not here met. We do not think it can be said that the employer sponsored the activity of going to Cockburn Town for recreation because it furnished free bus service between the town and the base. If such sponsorship could be inferred it would not inhere in an expedition made in the employer's jeep which the employees were prohibited from using for such purposes. The intervenor contends that Gondeck was subject to call at all times and that this, in some manner made his fatal injury an occurrence in the course of employment. The premise is unsupported and it is the Deputy Commissioner's finding that Gondeck was injured and killed "when, having completed his day's work" he journeyed to town, drank a beer, and was returning to his quarters. The injury did not occur on the employer's premises nor during the employee's working time. The injury and death of Gondeck were wholly disassociated from his employment environment. He had not been using recreational facilities

furnished by the employer nor did he use the means of travel to and from the place of recreation furnished by the employer. No benefit to the employer has been shown to result from the going by Gondeck to a native club for a beer unless it be for the intangible and, we think, immaterial benefit of improvement of morale that might be the consequence of such an excursion. The trip cannot be regarded as necessary travel to and from work. We find no evidence that furnishes a link by which the activity in which Gondeck was engaged was related to his employment. Larson, supra, 328-342, §§ 22.00-22.30; 99 C.J.S. 737 et seq., Workmen's Compensation, § 221 c; 58 Am. Jur. 748; Workmen's Compensation, § 237; *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, supra; *Ward* v. *Cardillo*, D.C. Cir. 1943, 77 App. D.C. 343, 135 F.2d 260; *N. L. Demara* v. *Employers Liability Assurance Corp.*, 5th Cir. 1958, 250 F.2d 799, cert. den. 358 U.S. 845, 79 S. Ct. 69, 3 L. Ed. 2d 79; *National Surety Corporation* v. *Bonds*, 5th Cir. 1960, 275 F.2d 389, cert. den. 364 U.S. 849, 81 S. Ct. 93, 5 L. Ed. 2d 73; *Brown-Pacific-Maxon, Inc.*, v. *Pillsbury*, D.C.N.D. Calif. 1953, 132 F. Supp. 421.

The appeal of the United States will be DISMISSED.

The judgment of the District Court setting aside and enjoining the enforcement of the Deputy Commissioner's order is

AFFIRMED.

Judgment of the Court of Appeals

Extract from the Minutes of February 9, 1962.

No. 18897

UNITED STATES OF AMERICA and JEANETTE E. GONDECK,
Intervenor,

vs.

PAN AMERICAN WORLD AIRWAYS, INCORPORATED, and THE TRAVELERS INSURANCE COMPANY.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the appeal of the United States in this cause be, and it is hereby, dismissed; and that the judgment of the District Court setting aside and enjoining the enforcement of the Deputy Commissioner's order be, and it is hereby, affirmed.

* * *

[Title Omitted]

Findings of Fact and Conclusions of Law of District Court

This matter having come on before the Court on the motions for summary judgment and for review of the findings of the Deputy Commissioner upon the parties stipulated record for review, and the Court having examined the record, the pleadings herein and the briefs of counsel and, being fully informed in the premises, the Court thereupon enters its Findings of Fact and Conclusions of Law.

FACTS SUPPORTED BY SUBSTANTIAL EVIDENCE

1. The plaintiffs, Pan American World Airways, Inc. (Pan Am), and The Travelers Insurance Company, brought this action to review the findings of the defendant, William M. O'Keeffe, Deputy Commissioner, Sixth Compensation District (Deputy), granting an award to Jeanette E. Gondeck, the widow of Frank J. Gondeck, an employee of the plaintiff Pan Am.

2. Frank J. Gondeck, according to the undisputed, stipulated facts of record in this case, was, on April 24, 1958, an employee of Pan Am on San Salvador Island, British West Indies, having been transported there, fed and housed while there, at his employer's expense.

3. On April 24, 1958, Gondeck completed his scheduled eight-hour shift, came off duty, returned to his quarters, cleaned up, availed himself to some extent of the employer furnished recreation facilities on the base, drank some alcoholic beverage of unspecified amount (apparently not in excess), left the employer's government base in the company of several fellow employees in a company-owned jeep, the use of which had been denied employees for other than company business, in contravention of the employer's regulations, and despite the fact that the employer had furnished scheduled bus transportation to Cockburn Town, this party's destination.

4. Having arrived at Cockburn Town via the company jeep, Gondeck and his companions had a "Beer" at a native tavern, and, again contrary to company orders, picked up a native to give him a ride back to the base; on the return trip, before reaching the base, the jeep overturned seriously injuring Gondeck, from which injuries Gondeck died several days later.

5. The decedent was subject to call at all times in any emergency, but, not only was he not on call, nor on active duty, nor on any business in any way connected with his employment, but he and his companions were at the time of the injury, actively engaged solely in a pleasure trip of their own and in violation of two of their employers regulations regarding the jeep in which they were injured.

6. In a careful review of this record this Court is not only unable to discover any substantial evidence to support the findings of the Deputy, but it is unable to find any evidence in support of the findings before it for review.

7. The decedent's widow, Jeannette E. Gondeck, was allowed to intervene herein in support of the Deputy's award.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and subject matter of this case pursuant to the provisions of Title 33, U.S.C., Section 921, and Title 42, U.S.C., Section 1653, as made applicable to this case by Title 42, U.S.C., Section 1651.

2. The decedent-employee, Frank J. Gondeck, at the time of his death was an employee within the provisions of the Defense Bases Compensation Act.

3. The record contains no substantial evidence to support the Deputy's implicit finding that the decedent was engaged within the scope of his employment or that his injury and subsquent death arose out of or in the course of his employment.

4. There being no substantial evidence to support the findings of the Deputy, said findings are erroneous

and should be reversed and remanded for proceeding consistent with the decision of this Court.

Upon presentation of a final order in conformity with these Findings and Conclusions of Law, Judgment will be entered herein.

Dated at Miami, Florida, this 15th day of September, 1960.

/s/ EMETT C. CHOATE
United States District Judge

[Title Omitted]

Final Judgment of District Court

THIS CAUSE having come on before the Court on the Complaint of the Plaintiffs to enjoin a Compensation Order entered by the Defendant WILLIAM M. O'KEEFFE, Deputy Commissioner under the Longshoremen's and Harbor Workers' Compensation Act, and Answers having been filed by the Defendant and by the widow of the deceased Employee who petitioned for leave to intervene and who was permitted so to do, and the Court having examined the Record, and Briefs having been submitted, and the Court having heretofore on September 15, 1960, entered its Findings of Fact and Conclusions of Law, and the Record containing no substantial evidence to support the Findings of the Deputy Commissioner and said Findings being not in accordance with the law it is

ORDERED, ADJUDGED AND DECREED that:

1. The Compensation Order of WILLIAM M. O'KEEFFE, Deputy Commissioner, Sixth Compensation District, dated December 31, 1959, bearing File No. DB-C-773-373 awarding compensation to Jeanette E. Gondeck and Barbara Ann Gondeck, respectively the surviving

spouse and child of Frank J. Gondeck, deceased, be and the same hereby is suspended and set aside in whole;

2. A permanent injunction be and it hereby does issue against the said Deputy Commissioner, his officers, agents and employees, restraining enforcement of the aforesaid Order, permanently;

3. The aforesaid Deputy Commissioner be and he is hereby directed to set aside the said Order and enter an Order dismissing the claim.

DONE AND ODERED in the City of Miami, Dade County, Florida, on this 7th day of November, 1960.

EMETT C. CHOATE
District Judge

[Title Omitted]

Compensation Order of Deputy Commissioner

Such investigation in respect to the above entitled claim having been made as is considered necessary, and no hearing having been applied for by any interested party or considered necessary by the Deputy Commissioner, the Deputy Commissioner makes the following:

FINDINGS OF FACT

That on the 24th day of April, 1958, the decedent herein, Frank J. Gondeck, of 1200 Northeast 144th Street, Miami, Florida, was in the employ of the employer herein, Pan American World Airways, Incorporated, of Post Office Box 4187, Patrick Air Force Base, Florida, a contractor with the United States at San Salvador Air Force Base, San Salvador Island, British West Indies, in the Caribbean Compensation District, established under the provisions of the Defense Base Compensation Act (Public Law 208—77th Congress as amended), and that the

liability of the employer for compensation under the said Act was insured by The Travelers Insurance Company; that the case was transferred to the Sixth Compensation District in accordance with Section 19 (g) of the said Act with the approval of the Bureau of Employees' Compensation; that on the said day the decedent herein sustained personal injury resulting in his disability and subsequent death when, having completed his day's work and seeking reasonable recreation and entertainment, the decedent journeyed to Cockburn Town, a native village on San Salvador Island, British West Indies, drank one glass of beer, rode in a jeep back toward the decedent's living quarters, and the jeep overturned on the road, which resulted in a fracture of the decedent's skull and an epidural hemorrhage; that the decedent was paid in full for the day of the accident and died on April 27, 1958, as a result of the injuries sustained on April 24, 1958; that temporary total disability did not extend beyond the three-day waiting period; that the decedent was a passenger in a jeep being driven by another person when the accident occurred; that intoxication of the decedent was not the sole cause of the accident; that the decedent was on call for emergency duty by the employer herein twenty-four hours per day as long as the decedent was on the island; that the decedent did not remove himself from a possible emergency call to duty on the day of the accident; that the employer provided the decedent with food and lodging as well as pay; that the employer knew the decedent and co-employees journeyed regularly to Cockburn Town for recreation and entertainment; that the employer to make the recreation and entertainment found in Cockburn Town more readily available to the decedent and other employees provided the employees with free transportation to Cockburn Town; that written notice of the injury and subsequent death was not given to the em-

ployer within thirty days, but the employer had knowledge of the injury and subsequent death and has not been prejudiced by lack of such written notice; that the employer provided the decedent with medical treatment, etc., in accordance with the provisions of Section 7 (a) of the said Act; that the average weekly wage of the decedent herein at the time of the injury amounted to more than $81.00; that the claimant herein, Jeanette E. Gondeck, who was born on April 26, 1913, and married to the decedent on May 3, 1932, is the surviving widow of the decedent herein, Frank J. Gondeck, and is entitled to death benefits for herself at $28.35 per week (35% of the maximum average weekly wage of $81.00); that Barbara Ann Gondeck, who was born on August 29, 1940, is the surviving child of the decedent herein, Frank J. Gondeck, and that Jeanette E. Gondeck, mother and natural guardian of the child, is entitled to death benefits for the support of the said child at $12.15 per week (15% of the maximum average weekly wage of $81.00); that the surviving child, Barbara Ann Gondeck attained the age of eighteen years on August 29, 1958; that the funeral expenses of the decedent amounting to $1,083.05 were paid by the claimant, Jeanette E. Gondeck, and she is entitled to reimbursement in the sum of $400.00 on account of such expenditures; that the accrued death benefits to which Jeanette E. Gondeck is entitled for the support of the said child from April 27, 1958, to August 28, 1958, inclusive, is 17 5/7th weeks at $12.15 per week in the amount of $215.23; that the accrued benefits to which Jeanette E. Gondeck is entitled to for herself as the surviving widow from April 27, 1958 to December 30, 1959, inclusive (87 4/7th weeks at $28.35 per week), amount to $2,482.65; that the total accrued death benefits to which Jeanette E. Gondeck is entitled to for herself and for the support of the said child to December 30, 1959, inclusive, amounts to

$2,697.88; that the employer and the insurance carrier have paid nothing to the claimant as compensation; that the services and expenses of Thomas G. Spicer and Gay, Hyman and Anderson, Attorneys for the claimant, were necessary and the reasonable value of such services and expenses is $500.00.

Upon the foregoing facts the Deputy Commissioner makes the following:

AWARD

That the employer herein, Pan American World Airways, Incorporated, and the insurance carrier herein, The Travelers Insurance Company, shall pay to the claimant herein, Jeanette E. Gondeck, of 1200 Northeast 144th Street, Miami, Florida, death benefits as follows: 17 5/7th weeks at $12.15 per week for the support of Barbara Ann Gondeck, surviving child of the decedent, Frank J. Gondeck, from April 27, 1958, to August 28, 1958, inclusive, which is $215.23, and 87 4/7th weeks at $28.35 per week from April 27, 1958, to December 30, 1959, inclusive, which is $2,482.65 for death benefits due the widow, a total amount of $2,697.88 for death benefits to December 30, 1959, inclusive, all of which has accrued and the employer and the insurance carrier are directed to pay forthwith in one sum, less attorneys' fees hereinafter provided, and to continue payments thereafter in bi-weekly installments at $28.35 per week to Jeanette E. Gondeck, surviving widow of the decedent, Frank J. Gondeck, subject to the limitations of the said Act, or until otherwise ordered.

The employer herein and the insurance carrier herein are also directed to pay the sum of $400.00 to the claimant, Jeanette E. Gondeck, as reimbursement for funeral expenses.

A fee in the sum of $500.00 for services and expenses rendered on behalf of the claimant is hereby approved in favor of Thomas G. Spicer, Attorney, 819 Seybold Building, Miami, Florida, and Gay, Hyman and Anderson, Attorneys, 913 Ainsley Building, Miami, Florida, and made a lien on the accrued death benefits.

Given under my hand at Jacksonville, Florida, this 31st day of December, 1959.

(Sgd.) WILLIAM M. O'KEEFFE

William M. O'Keeffe, Deputy Commissioner
Sixth Compensation District.

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Supreme Court of the United States

OCTOBER TERM, 1961

No. 919

JEANETTE E. GONDECK, Intervenor,

Petitioner,

vs.

PAN AMERICAN WORLD AIRWAYS, INCORPORATED and THE TRAVELERS INSURANCE COMPANY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

I

THE QUESTIONS

In this case there are no special nor important nor substantial reasons for certiorari.

Petitioner asseverates there are, however, and proposes three strawmen in h[illegible] "Questions Presented". We cannot agree that those straw questions are the questions in this case.

The first two questions (which as put by Petitioner are distortions and omissions) are comprehended, we suggest without partiality to either side, by this question which we put to the Court below as the controlling question in this case (see our Brief below at page 13):

> "The question at bar is whether an employee hired to work out of the United States on a Bahama island who is injured (and dies) when a jeep overturned in which he was a passenger while away from the employer's premises on a private (i.e. not employer sponsored or aided) recreational trip of his own has suffered an injury 'arising out of and in the course of employment'. [33 U.S.C.A. Sec. 902(2)]"

Or, if a different formulation be preferred, the question might be phrased by putting the following West Syllabus to this case in interrogative form: See 299 F.2d at 74, Syllabus 5:

> "Where diesel generator operator at defense base in British West Indies was subject to call for emergencies when off duty, there was recreation center on base, employer transported employees without charge by bus to town and employees were prohibited from using jeep for recreation purposes, death of operator while returning in jeep from native club in town where he had had a beer after working hours did not arise out of or in the course of employment and hence was not compensable. Longshoremen's and Harbor Workers' Compensation Act, Sec. 1 et

seq., 33 U.S.C.A. Sec. 901 et seq.; 42 U.S.C.A. Sec. 1651 et seq."

The third question put by Petitioner is not only a distortion and omission but a peculiar turnabout.

For it was the Petitioner who argued to the Court below that the Administrative Procedure Act had nothing to do with this case at all; that the Deputy Commissioner's inferences are: "unreviewable" (Gondeck Brief below, page 13), "are not judicially reviewable" (ibid); etc. And it was we who pointed out the law now stated by Petitioner to be correct and applicable.

And so it was that the Court below said: See Opinion at A. 7 of Petitioner's Petition here:

> "The Intervenor-Appellant asserts that 'In the absence of a finding that Gondeck was injured and killed within the terms of Section 903(b), the award must be reinstated.' This is not an accurate statement, at least since the passage of the Administrative Procedure Act, of the principle governing a judicial review of an administrative determination. The findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole. O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504, 71 S.Ct. 740, 95 L. Ed. 483; Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 71 S. Ct. 456, 95 L.Ed. 456. ***"

And so it is that, and quite contrary to Petitioner's question, West Syllabus Note 4 reads:

"Deputy Commissioner's findings, in compensation case, are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole. Longshoremen's and Harbor Workers' Compensation Act, Sec. 1 et seq., 33 U.S.C.A. Sec. 901 et seq.; Administrative Procedure Act, Secs. 1-12, 5 U.S.C.A. Sec. 1001-1011."

II

REASONS FOR GRANTING THE WRIT

The above is another of Petitioner's captions.

The first reason advanced is "because the beneficial provisions of the compensation laws were disregarded and the intent of Congress misapprehended when it was held that Frank J. Gondeck's death was not a consequence of his employment". This of course is sheer *ipse dixit* and not a reason but a conclusion. No more need be said on that.

The second reason advanced is that the Court of Appeals for the Fifth Circuit is in conflict with the opinions of this Court and other Courts of Appeal. There is no conflict and in our Brief below we challenged Petitioner then to submit a reported federal case holding compensable an injury suffered while engaged in private (i.e., non-employer sponsored or aided) recreational activity. There isn't any. In truth the only reported federal decision on point is squarely with us: **Brown-Pacific-Maxon, Inc. v. Pillsbury**, 132 F.S. 421 (D.C. Calif. S.D. 1953).

Attached to that second reason is another: that the

Court of Appeals for the Fifth Circuit is holding that the employer must receive some tangible benefit as contrasted to improvement of work or moral. The Court did not so require. Instead what the Court was talking about was that factor together with other factors. This will more plainly appear later and is obvious from the face of the opinion.

The third reason is that the Court of Appeals for the Fifth Circuit "departed from the opinions of this court and other courts of appeal by setting aside an award of compensation for death suffered by defense base worker while returning to base in a company vehicle". That of course is not the fact in this case. The fact in this case is as the Court of Appeals stated:

> "He had not been using recreational facilities furnished by the employer nor did he use the means of travel to and from the place of recreation furnished by the employer." (A. 8-9)

The fourth reason is that the Court of Appeals for the Fifth Circuit "has penalized the widow and minor child of a deceased defense base worker for the violation of a company rule by another worker without the decedent's fault". Again that is not the holding below nor the facts in this case. The holding below is that:

> " *** We do not think it can be said that the employer sponsored the activity of going to Cockburn Town for recreation because it furnished free bus service between the town and the base. If such sponsorship could be inferred it would not inhere in an expedition made in the employer's

> jeep which the employees were prohibited from using for such purposes. ***" (A. 8)

The fifth reason is that the Court of Appeals for the Fifth Circuit "has misapprehended the scope of judicial review permitted in the Administrative Procedure Act and has expanded the judicial authority." We have already pointed out that this represents a most peculiar turnabout on the part of the Petitioner who argued below that the Administrative Procedure Act had nothing to do with this case at all, etc. Of course the Court did not do what Petitioner says it did.

We note that the Petitioner has omitted as an appendix the stipulated facts upon which the Deputy based his Order.

We have therefore attached as an Appendix to this Brief the Stipulation.

It cannot be too strongly emphasized in this connection that, as the Court of Appeals pointed out but did not dwell particularly on, the evidentiary facts were stipulated and it was the Deputy Commissioner's inferences and legal conclusions drawn from those facts that were reviewed. When Petitioner states that the facts ". . . are adequately summarized by the Court of Appeals, and the Court's statement from its opinion is accepted as the statement of the case . . . " (Petition at p. 4) it becomes apparent that we are dealing with questions of law and the point about misapprehending the scope of judicial review is just talk.

We will go into this more when we treat the particular points that the Petitioner makes.

POINT I

We are using Petitioner's captions. Under this particular head the Petitioner makes the argument that reasonable recreation is an incident of civilian employment at a United States Military Base in a foreign land, citing the **O'Leary v. Brown-Pacific-Maxon** decision of this Court and other decisions.

But **O'Leary** held only that the employer had made reasonable recreation an incident of the employment at the defense base and turned largely on the "zone of special danger" that had been created or allowed to come to pass by the employer in that case. **O'Leary** has always struck us as being very much akin to a mother locking her children in the back yard where there is a swimming pool, telling the children not to go in, then going downtown shopping, and being much surprised when on her return home she finds that the children have gone into the pool and drowned.

The other cases cited by Petitioner are all cases dealing with injuries that occurred while the employee was using employer provided or sponsored recreational facilities or employer provided or sponsored transportation. We quarrel with none of them. They are inapplicable to the case at bar.

Taking the cases one by one as they are cited by the Petitioner:

In **Hastorf-Nettles**, the employee was returning to camp **in the employer provided truck** when the accident occurred in which he was injured.

In the **Lytle Co. v. Whipple** case the employee was returning to his barracks **in the company truck** when he was killed and the Court cited the next following case, **Liberty Mutual Ins. Co. v. Gray** in support of its holding. We have no quarrel with any of these cases.

In **Liberty Mutual Ins. Co. v. Gray**, compensation liability had attached with the **employer provided transportation:** the employee was on his way back to his construction camp on Oahu in a truck provided by the employer to transport employees from Honolulu to the camp.

Turner v. Willard involved an injured claimant who was a captain of one of the bowling leagues organized by and sponsored by the employer. **He was on bowling league business.**

Travelers Insurance Company v. O'Hearn is an unreported case. We consider the citation of an unreported case to be entirely improper because there obviously is no report to examine. The same comment is applicable to the other **Travelers Insurance Company v. O'Hearn case.**

The State cases that are cited by Petitioner are: **Lamm v. Silver Falls Timber Co.**, which involved a logger who had finished his recreation and was on the defendant's logging railroad going

back to camp—**the transportation being furnished by the employer**—when the accident occurred. We have no quarrel with this case nor with any of these cases which hold as the rule that when an employer provides transportation the compensation liability commences with the transportation.

The **Gabumas** case and the **Lewis** case are both unusual cases entirely apart from the case at bar which might best be summed up by what the New York Court of Appeals said in **Lewis:**

"* * * Here Lewis was sent by his employer to a country where there had been warfare for a long time and where an uneasy truce was in effect."

In fact, if **Larson** on **Workmen's Compensation** will be examined at Sec. 25.00 et seq. a number of traveling employee cases will be found with various and sundry **ratio decidendi.** Some of these New York cases might be considered to award compensation because of the "strange customs" and "abnormal conditions" of travel in a foreign land but it is obvious they have no light to shed on our case.

Petitioner suggests at page 7 of her Brief that "In analogous situations, such as actions for seamen's maintenance and cure, injuries suffered during shore leave have been held by this Court to be within the scope of employment."

That statement and citation of two Jones Act cases

dealing with maintenance and cure surprise us, as well as the suggestion that the Jones Act situations are "analogous". Maintenance and cure has certain limitations not applicable to Workmen's Compensation—as for example the fact that maintenance and cure is not paid throughout a "permanent and total disability"—and again maintenance and cure in itself is an old maritime doctrine.

For the suggestion to be made that situations are analogous that date back to the "Laws of Oleron" and the saga of the seas and the doctrine of seamen being wards, is demonstration of an **in extremis** argument.

Congress could have so provided but in fact Congress did not. The Federal Longshoremen's and Harbor Workers' Act is a complete and well thought out entity in and of itself providing for compensation under specific and particular conditions. The Federal Longshoremen's and Harbor Workers' Act was made applicable to defense bases and to the employment in the case at bar by the Defense Bases Compensation Act, 42 U.S.C. Sec. 1651 et seq. Had Congress wished a wider coverage to be given under the Act to employees at defense bases, had Congress considered, as the Petitioner would have this Court believe, that it "intended" a wider coverage, then of course Congress could have provided the wider coverage but Congress did not.

For example, Congress provided the wider coverage under the Federal Employees Compensation Act—5 U.S.C. Sec. 51 et seq.--by saying in 42 U.S.C. Sec. 1701 "and such injury proximately results from a war risk hazard, whether or not such person in actuality was engaged in the course of his employment". Congress again widened

the coverage in this very Defense Bases Compensation Act with respect to injuries received during transportation to and from the place of employment by saying in 42 U.S.C. Sec 1651(a)(4) that coverage "shall include any injury or death occurring to any such employee during the transportation to and from his place of employment, where the employer or the United States provides the transportation or the cost thereof".

The fact is therefore that Congress did not in its Defense Bases Compensation Act broaden the scope of the coverage of the Federal Longshoremen's and Harbor Workers' Act except in the one particular just above noted.

Petitioner then contends that the Fifth Circuit is in conflict with **O'Leary** because the Fifth Circuit said, inter alia, that no benefit to the employer had been shown.

If, however, the opinion of the Fifth Circuit will be read it will be found that the Court was saying that no matter how hard it looked it could not find any evidence to furnish a link "by which the activity in which Gondeck was engaged was related to his employment". The Court was not laying down a rule that there must be benefit to the employer; the Court was trying to find if there was any possible link between the employment and the injury.

Petitioner then argues that there is a presumption of coverage. Of course a presumption of coverage does not have the quality of independent affirmative evidence —see **John W. McGrath Corp. v. Hughes**, 264 F.2d 314 (C.A.2d 1959) and this is merely a makeweight.

We have no argument whatever with the espousal by the Petitioner of the doctrine of liberal interpretation of the Federal Longshoremen's and Harbor Workers' Compensation Act. We agree that that Act is to be liberally construed in favor of the employee. To go from the doctrine of liberal construction, however, to the abolition of there being a link between the employment and the injury is stretching the elasticity of interpretation beyond the breaking point.

POINT II

Under this head the Petitioner states that the "Deputy Commissioner properly rejected outmoded common law conceptions of scope of employment and held the decedent was injured within a zone of special danger".

Unfortunately for Petitioner's contention, there were no such findings by the Deputy. The Deputy did not say that he was rejecting outmoded common law conceptions nor did he hold that decedent was injured within a zone of special danger. The Deputy's opinion may be read from beginning to end without finding any such conclusion as this.

We agree of course that under the Federal Longshoremen's and Harbor Workers' Compensation Act a common law conception of scope of employment is not applicable. The requirement under the Act is that the injury must be one "arising out of and in the course of employment". The Fifth Circuit did not go off into what Petitioner says. What the Fifth Circuit did was to say that it could find no "link by which the activity in which Gondeck was engaged was related to his employment". That is no common

law conception but rather straightforward application of modern compensation law.

The assertion by the Petitioner that: "The doctrine of 'zone of special danger' has been discarded by the Fifth Circuit" is of a piece with the other stretchers made by Petitioner. There just wasn't any 'zone of special danger'.

POINT III

Under this head are the arguments previously made by the Petitioner with, however, the assertion that had Gondeck gone in to town by bus and hitched a ride back he would have been covered. That is not what the Fifth Circuit said nor is it correct. In addition, Petitioner makes the following statement which has no support whatever in any part of the Record and the source of which is a mystery to us: "The company rules permit employees to hitch back from town." We know of no rule, we know of no issue in connection with such an assertion, there is no such factor in this case.

POINT IV

Under this head the argument is made that the Deputy properly refused to penalize the Claimant for violation of a non-communicated unenforced company rule. This contention, repeated a number of times, is entirely beside the point in this case.

As was said in our Brief below, the District Court did not reverse the Deputy on the ground that the decedent was violating company regulations by using the jeep—and we have no quarrel with the rule stated by

the Petitioner that employees should not and must not be denied compensation for violation of uncommunicated unenforced company rules—and the fact is that we have said this repeatedly and over and over again—and the fact is that Petitioner continues to make the same argument over and over again.

What happened was that the District Judge stated that the recreational trip could hardly be said to be employer sponsored or employer approved or arising out of or in the course of employment when the jeep itself was not permitted to be so used. And that is as far as this matter went. It did not go to the point of denying compensation because of violation of company rules.

Nor did the Fifth Circuit do what Petitioner claims it did. All that the Fifth Circuit said was that it did not think it could be said that the employer sponsored the activity of going to Cockburn Town for recreation because it furnished free bus service between the town and the base; and that if such sponsorship could be inferred, it would not inhere in an expedition made in the employer's jeep which the employees were prohibited from using for such purpose. The West syllabi are proof enough of what the Court said as contrasted to what Petitioner says it said.

POINT V

When Petitioner under this head states:

"Presumably, the Court of Appeals would have reinstated the compensation award except that

> it conceived that under the Act it had authority to reweigh the evidence. . . . "

this is another of the sheer gratuities paid to the Fifth Circuit by the Petitioner. The Court had no such idea. The Court did no such thing. The Court did not, as Petitioner claims it did, widen the scope of judicial review.

It is an odd turnabout as we have previously noted: and the facts were all stipulated: but more significantly what sense is there to a contention about reweighing evidence when Petitioner concedes that the facts in this case " . . . are adequately summarized by the Court of Appeals and the Court's statement from its opinion is accepted as the statement of the case . . . " (Petition at p. 4)

CONCLUSION

Actually, due to the stipulated facts in this case, the question essentially was sheerly one of law and on that question the Fifth Circuit Court of Appeals properly ruled, under the stipulated facts, that the injury and death of Gondeck were wholly disassociated from his employment and that there was no evidence to furnish a link by which the activity in which the decedent was engaged was related to his employment. He was at the time engaged in a private — not employer sponsored and not employer aided — recreational trip of his own which was purely personal to him and the risks that he incurred were again purely personal to him and not arising out of the employment.

The issue in these cases is "Is the risk personal or employment related?" That is what was decided here, on stipulated facts. The Deputy's finding was not only unsupported by substantial evidence on the record considered as a whole but there was no evidence to support it. And, more significantly, the question, essentially, was one of law which again had only one answer.

We therefore respectfully submit that in this case there is no important, special, or substantial reason for certiorari.

We might observe that the only reported federal decision dealing with this specific situation is a District Court decision in **Brown-Pacific-Maxon, Inc. v. Pillsbury,** 132 F.S. 421 (D.C. Calif. S. D. 1953) in which virtually the same fact situation was held by the District Judge to result in non-compensability.

Respectfully submitted, this
_____ day of May, 1962.

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Miami 32, Florida
Attorney for Respondents

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief in Opposition to Petition for Certiorari were mailed to Arthur Roth, Esq., 1111 Ainsley Building, Miami 32, Florida, and Norman Miller, Esq., 20 S. E. First Avenue, Miami 32, Florida, this _____ day of May, 1962.

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APPENDIX

(This Stipulation of Facts may be found in the Transcript of Record at p. 7-13)

STIPULATION OF FACTS

1. Pan American World Airways, Inc., contracted with the United States Government to staff the non-military portions of certain of the United States Guided Missile Tracking Bases with civilian employees.

2. The deceased, FRANK J. GONDECK, a resident of Florida, was employed by Pan American World Airways, Inc., in March, 1958, to work on San Salvador Island, B.W.I., as a diesel generator operator. The terms of his employment required him to report to Patrick Air Force Base, near Cocoa, Florida, and be transported by air, at his employer's expense, to San Salvador Island, B.W.I., where he was to remain for forty-five (45) days. He was then to be returned to Patrick Air Force Base, at the expense of his employer, and receive a seven-day leave. Thereafter, he was again to report to Patrick Air Force Base, be transported to San Salvador Island to work another forty-five (45) days and receive another seven-day leave, as before. The same procedure was to be followed thereafter, except that the work periods were to be for three (3) months and the leave periods to be fourteen (14) days. His remuneration included a 30% bonus for working overseas, and periodic raises were contemplated in the future.

3. FRANK J. GONDECK'S duties were to operate the diesel engines generating electricity in the power-

house. He worked eight (8) hours, then was off twenty-four (24) hours, but was subject to call in the event of an emergency. His salary was $513.00 a month, which included a 30% overseas bonus.

4. The employer furnished transportation from and to Patrick Air Force Base, housing facilities, board and laundry, and transportation on the Island.

5. Such transportation as might be needed on the Island was supplied by a Pan American motor bus operated by a Pan American bus driver on a regular schedule from the Base to the town, at no charge.

6. The housing facilities consisted of a room in a dormitory, each room being occupied by four men, the dormitory being approximately 100 feet long and facing the Atlantic Ocean, as shown on the sketch attached hereto as Exhibit "A", the dormitories being marked "5" on the Exhibit.

7. At the Base there was also a recreation center for the employees known as the "Reef Club". (On Exhibit "A", this is labeled the "Subsistence Building").

8. The town is Cockburn Town, which has native clubs in a section known as Victoria Hills, where PAA men were commonly known to go for beer. One of the native clubs is the "Blue Marlin Club". Cockburn Town is predominantly Negro, there being very few White people on San Salvador.

9. Pan American, for the use of powerhouse employees in going back and forth to some of the more re-

mote diesel operations (the powerhouse on the Base is only one of several diesel operated electric generating plants), has one jeep. The use of this jeep for personal missions by employees is forbidden by Pan American. The jeep in question was assigned to the powerhouse and was checked out to Mr. E. Wells, powerhouse superviser, on a daily basis.

10. The powerhouse superviser, Mr. E. Wells, some three or four days prior to April 24, 1958, had warned Smith and Norman, two of the powerhouse employees, that the powerhouse jeep was not to be used for anything except official business.

11. On April 24, 1958, FRANK J. GONDECK reported for work as usual at 0800, worked his regular eight-hour shift, and went off duty at 1600 hours. He, together with some other employees, went to the "Reef Club", and there about eight or nine of the civilian employees sat around drinking champagne. The employees drinking were, specifically, Fox F. Fry, Frank Gondeck, James F. Norman, and R. M. Smith. The Superviser, Wells, was asked by Fry to join them and have a glass of champagne, which he did. Wells then went to the mess hall, had dinner, then went to his quarters and cleaned up. About 1730 hours he started to a movie on the Base and stopped by the "Reef Club" to have a beer. At that time, the same men were there sitting at the same tables drinking. Wells had a beer and then started for the movie. He went to the movie but did not stay long, left the movie and returned to his quarters. He was in his quarters when informed about the wreck. If produced as a witness, he would further state that he did not know that the men

were going to use the jeep and that no permission had been given to them to use the jeep.

12. James F. Norman, civilian powerhouse operator, if produced as a witness, would testify as follows:

"On 24 April 1958, I used the powerhouse jeep, and accompanied by Fry, Smith, and Gondeck, other powerhouse operator, proceeded to a native village about three miles from the Base. We stopped at a local beer place and ordered one beer. We spent about fifteen minutes at this beer place. At this time we proceeded toward San Salvador AFB. The native at the beer place asked us for a ride (I do not know his name). The native said that he worked at the Base. He then got into the jeep. As we approached the Base, I believe the wheels hit a hole in the road and caused the wheel to jerk to the left. I then jerked them to the right and this caused the jeep to skid, and I was thrown out of the jeep. I judge the speed of the jeep was about 30 miles per hour. The jeep is checked out permanently to the powerhouse and it is used by the personnel of the powerhouse to change watches at the three different powerhouses. The jeep was being used at the time of the accident for personal use. Before leaving the Base, we had been drinking, but not to excess. I am familiar with instructions that natives are not allowed to ride in PAA vehicles if they are not employed at the Base. After Smith verified the native's being employed at the Base, he was allowed to ride in the jeep. I cannot explain what

caused the jeep to go into the skid, as it happened so fast and I know the front end of the jeep has been bad for a long time. The Base maintenance section knows the jeep had a bad front end."

13. Fox F. Fry, civilian powerhouse operator, if produced as a witness, would testify as follows:

"I was involved in an accident with a ¼ ton jeep near the entrance to the Base. I was at the Base Club at about 1700 hours, had a beer, went to the mess hall, had chow, and talked with other powerhouse operators until time for the mess hall to be closed. I then went back into the Club where I had some more beer, continued talking to the others. Meanwhile, we left the Club, continued talking, and proceeded to the main powerhouse. About 1930 hours, Smith, Gondeck, myself, and Norman, driving, took the PAA ¼ ton jeep assigned to the powerhouse, proceeded to a native village located about three miles from the Base. We spent about fifteen minutes having a beer at a native beer place. We left the beer place to return to the Base. The native (I do not know his name) came out of the beer place with Smith and loaded into the jeep. After leaving the beer place with Norman driving, we proceeded toward the Base, at a rate of about 30 or 35 miles per hour. Just before reaching the entrance gate, the jeep seemed to go to the left and then skid to the right. I remember the chrome from the jeep being thrown from the jeep. I got up in a daze and walked to the

powerhouse and informed the operator of the accident. Then I passed out. I have no knowledge of the reason the native was riding in the jeep. All of the U. S. occupants of the jeep had been drinking, but not to excess."

14. Attached is a sketch, Exhibit "B", showing where the vehicle overturned. PAA Investigator, L. E. Bail, if produced as a witness, would testify that he examined the road at the scene of the accident on April 28, 1958, after ascertaining that there had been no changes in the highway since the accident of April 24th, and found that the vehicle was traveling Southwest and when at a point 147 feet Northeast of the gate, the vehicle went into a skid which lasted for 82 feet, 9 inches, to the point of overturn; the skid marks and dragging after the overturn indicated that the vehicle turned over one and one-half times and came to rest on its left side, 65 feet from the point of the original overturn; the physical evidence indicated continuous acceleration while the jeep was in the skid.

15. The accident occurred at approximately 2005 hours. R. M. Smith was dead when help arrived at the scene. Gondeck, Norman, Fry, and the native, R. Lightbourne, were flown from the Base for medical attention; Lightbourne to Nassau, Bahamas, and Gondeck and the others first to Patrick Air Force Base, then to Orlando, Florida, where, on April 27, 1958, Gondeck died of the injuries he had suffered in the overturn, as per a certified copy of the Death Certificate attached hereto as Exhibit "C".

16. At the time of his death, Gondeck left surviving

and dependent upon him a widow, Jeanette E. Gondeck, and a daughter, Barbara Ann Gondeck. The daughter's birthdate is August 29, 1940.

Respectfully submitted,

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